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# Ocean and Coastal Case Alert

**The National Sea Grant Law Center** is pleased to offer the December 2020 issue of *Ocean and Coastal Case Alert*.

The Case Alert is a monthly newsletter highlighting recent court decisions impacting ocean and coastal resource management. (NSGLC-20-03-12).

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## FIRST CIRCUIT

### New Hampshire

***Sierra Club and Conservation Law Found. v. Granite Shore Power LLC***, 2020 WL 6946588 (D.N.H. Nov. 25, 2020).

The U.S. District Court for the District of New Hampshire denied a defendant's motions for summary judgment in a case concerning a coal-fueled power plant on the Merrimack River in Bow, New Hampshire. First, the court reasoned that the defendant's mootness argument did not merit summary judgment. While the issues with the plant's 1992 permit may become moot once the defendant's new 2020 permit is issued, the 2020 permit is still under appeal. Thus, until the administrative appeals of the 2020 permit are resolved, the 1992 permit remains in effect. The court also denied a motion for summary judgment alleging that the defendants failed to follow reporting requirements in their 1992 permit application. The court found that there is a genuine dispute of material facts regarding the reporting requirement; therefore, it should not be subject to summary judgment.

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## FOURTH CIRCUIT

***Sierra Club v. U.S. Army Corps of Eng'rs***, 2020 WL 7039300 (4th Cir. Dec. 1, 2020).

Environmental groups filed motions to stay certain agency actions related to the discharge of dredge and fill material into the waters of the United States for the construction of a pipeline. The U.S. Court of Appeals for the Fourth Circuit ruled that the plaintiffs were likely to succeed on their challenge to the U.S. Army Corps of Engineers' (Corps) decision to allow Mountain Valley Pipeline (MVP) to verify with two Corps district offices that its proposed discharge would be governed by a nationwide permit (NWP). The court recognized that the verification was likely issued in

contravention of applicable law because the Corps impermissibly incorporated a modified permit condition from the West Virginia Department of Environmental Protection (DEP). The DEP Division Engineer who approved the modified permit condition did not have the authority to do so. Since the modified permit condition was less stringent,

and thus would have damaged the petitioners for not having appropriate authorities make the decision, the court stayed the verification. Therefore, MVP will need to either re-verify their discharges to be governed by the NWP or will be required to adhere to CWA standards set by each individual state.

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## FIFTH CIRCUIT

***In re S. Recycling, LLC***, No. 20-40274, 2020 WL 7135141 (5th Cir. Dec. 7, 2020).

The owner of a tug/barge unit in a shipyard for shipbreaking and recycling petitioned for exoneration or limitation of liability under the Limitation of Liability Act after an explosion caused the death of and injury to workers. The U.S. District Court for the Southern District of Texas dismissed for lack of admiralty jurisdiction. On appeal, the Fifth Circuit affirmed, holding that the unit was a “dead ship,” rather than a “vessel,” and, thus, the court lacked admiralty jurisdiction in a limitation of liability action. The court noted, “The precise moment a ship is withdrawn from navigation can be a difficult, fact intensive inquiry. We are fortunate that we need not decide precisely how many rotten planks must be removed before Theseus’ ship ceases to be Theseus’s ship. When her bow has been severed, leaving a gaping hole open to the sea, her cargo tanks have been rendered inoperable, and the party asserting jurisdiction is unable to even allege any types of people or things that she is capable of carrying over navigable water, we can readily conclude that DBL 134 is no longer a vessel.”

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## Mississippi

***Harrison County, Mississippi v. Mississippi River Comm’n***, 2020 WL 6828746 (S.D. Miss. Nov. 20, 2020).

The U.S. District Court for the Southern District of Mississippi granted Harrison County’s Second Motion for Jurisdictional Discovery in a case concerning the reopening of the Bonnet Carre Spillway. The court’s review of the administrative record revealed that the majority of records provided by the defendant were irrelevant due to them dating back to 1999, with only 17 pages of documents relating to the recent decision to open the Bonnet Carre Spillway. Thus, the plaintiffs are entitled to further discovery before determination of the defendant’s Motion to Dismiss can be made. The plaintiff’s motion to amend its complaint in order to add claims based on the Magnuson-Stevens Act and Endangered Species Act was rejected. The plaintiffs have been granted 60 days to conduct jurisdictional discovery.

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***RW Dev., LLC v. Miss. Gaming Comm’n***, No. 2019-SA-01813-SCT (Miss. Dec. 10, 2020).

In consolidated appeals, the Mississippi Supreme Court affirmed two lower court opinions finding that a proposed gaming site failed to meet state statutory and regulatory requirements. In both cases, the lower court affirmed the Mississippi Gaming Commission’s (MGC) decision to deny the company’s application. The Mississippi Supreme Court agreed that in the first case, RW Development failed to provide evidence that its proposed gaming site was within eight hundred feet of the mean high water line (MHWL). In the second case, the company did not establish that the MHWL point of reference was located on the its property, that it owned or leased the land contiguous to the point of reference and its proposed gaming site, and that the land would be an essential part in the development.

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## NINTH CIRCUIT

***Ctr. for Biological Diversity v. Bernhardt***, No. 18-73400, 2020 WL 7135484 (9th Cir. Dec. 7, 2020).

An environmental group challenged the Bureau of Ocean and Energy Management (BOEM) and the U.S. Fish and Wildlife Service’s (FWS) approval of the Liberty Project, an offshore drilling development along the coast of Alaska. The court held that the FWS violated the Endangered Species Act by relying on mitigation measures that were uncertain and nonbinding upon the Liberty Project. Also, the court held that by failing to provide an estimate of the Liberty Project’s nonlethal take of polar bears, the FWS’s biological review was flawed. Thus, the court found BOEM’s

reliance on FWS's opinion to be arbitrary and capricious and vacated its approval of the Liberty Project. The court further ruled that BOEM's approval failed to account for emissions from foreign oil consumption in its Environmental Impact Statement as required by the National Environmental Policy Act. The court remanded the approvals back to the agencies for review.

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## California

***Spotlight on Coastal Corruption v. Kinsey***, 2020 WL 6882940 (Cal. Ct. App. Nov. 24, 2020).

A nonprofit organization brought suit against California Coastal Commissioners for violating provisions of the California Coastal Act that prohibit nondisclosure of *certain ex parte* communications and for participation in a matter without disclosing related *ex parte* communications. A lower court granted the organization summary judgment, and the Commissioners appealed. The appellate court found that the organization lacked standing under the California Coastal Act § 30820(a)(2), and thus reversed the decision of the lower court with instructions to enter judgment for defendants. The court reasoned that the organization did not meet the requirements to gain public interest standing because it did not request a writ for mandamus. The court also refused to grant public interest standing based on the lower court's misinterpretation of the discretionary rule regarding the public interest. The court pointed out that the court has discretion on whether or not to deny public interest standing but not on whether to grant it.

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## Washington

***Columbia Riverkeeper v. U.S. Army Corp of Eng'rs***, 2020 WL 6874871 (W.D. Wash. Nov. 23, 2020).

The U.S. District Court for the Western District of Washington granted an environmental group's motion for summary judgment regarding U.S. Army Corp of Engineers (Corps) permits for construction of the Kalama Manufacturing and Marine Export Facility. The court found that the Corps failed to meet its statutory requirements under the National Environmental Policy Act (NEPA), Clean Water Act (CWA), and Rivers and Harbor Act (RHA) for drafting an Environmental Impact Statement (EIS) and Public Interest Review for the Kalama Project. The court held that the Corps' decision not to issue an EIS failed to consider reasonably foreseeable effects on greenhouse gas emissions in Washington and Oregon that would result from the project, such as an increase in fracking and the need for a new regional pipeline, thus making its decision arbitrary and capricious under the Administrative Procedure Act. The court also ruled that the Corps failed in its Public Interest Review by not considering detrimental environmental factors. The court vacated the permits and remanded back to the Corps to conduct an EIS and Public Interest Review. The court granted summary judgment in favor of the National Marine Fisheries Service, another defendant, finding it met all requirements for its Incidental Take Statement under the Endangered Species Act.

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## D.C. CIRCUIT

### District of Columbia

***American Waterways Operators v. Wheeler***, 2020 WL 7024195 (D.D.C. Nov. 30, 2020).

In 2017, the Environmental Protection Agency (EPA) designated Puget Sound as a "No Discharge Zone" (NDZ), meaning commercial and recreational vessels could not discharge sewage. In doing so, the EPA issued a finding that there was "reasonable availability" of adequate facilities for the safe and sanitary removal and treatment of sewage in the Puget Sound. American Waterways Operators sought to overturn the designation on the basis that EPA's decision was arbitrary and capricious. The EPA acknowledged that it did not properly consider the compliance costs of the action. Interveners in the case argued that the EPA did not commit error in its designation. The U.S. District Court for the District of Columbia found that the language of the Clean Water Act, in requiring that there be adequate pumping facilities "reasonably available" to vessels, is a textual hook that requires the EPA to consider compliance costs in its decision making over the NDZ. Thus, the court granted summary judgment to American Waterways and EPA.

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